SHERIFF APPEAL COURT

GLW-CA158-14

Sheriff Principal D L Murray
Sheriff Principal C D Turnbull
Appeal Sheriff W H Holligan

OPINION OF SHERIFF PRINCIPAL D L MURRAY

in appeal by

MOHAMMED AQEEL ALAM and TAHIR SHAH,

on behalf of ICU (EUROPE) LIMITED

Pursuer and Respondent

against

SAQUIB IBRAHIM

First Defender and Appellant

ICU (SECURE) LIMITED

Second Defender

and

SADIA IBRAHIM

Third Defender and Respondent

Pursuer and Respondent: A W MacKenzie, solicitor; Harper Macleod LLP
First Defender and Appellant: C C Wilson, advocate; Balfour & Manson LLP
Second Defender: No appearance
Third Defender and Respondent: G Dewar, advocate; Thorley Stephenson Ltd

1 December 2020

Background

[1] This commercial action seeks an order for count, reckoning and payment. It is raised as a derivative action by Mr Alam and Mr Shah, the two minority shareholders of the pursuer, ICU Europe. It has had an extended procedural history, before calling as a proof before answer at which evidence was heard on three consecutive days in February 2019 and 2 days in July 2019. I refer to the various parties as follows. Mohammad Aqeel Alam ("Mr Alam"), Tahir Shah ("Mr Shah"), ICU Europe Limited ("ICU Europe"), Saquib Ibrahim ("the first defender"), ICU (Secure) Limited ("ICU Secure"), Sadia Ibrahim ("the third defender"). The appeal is against the sheriff's decision of 13 August 2019 to make an order for count reckoning and payment against the first defender and ICU Secure jointly and severally for all profits made by them and Sitewatch Limited and I-Watchers Limited. In addition, there is a cross-appeal at the behest of ICU Europe.

[2] Many of the findings made by the sheriff are challenged on appeal but it is convenient to set out the background to the case on the basis of the facts as found by the sheriff. ICU Europe was incorporated by Mr Shah and the first defender on 19 January 2004 when they were also appointed directors. Mr Shah ceased to be a director on 1 January 2006. The first defender remained a director of ICU Europe until 3 March 2010. Mr Alam became a shareholder in 2008. He owned 8% of the share capital of ICU Europe, 2% was owned by Mr Shah and the remaining 90% by the first defender. ICU Europe sold CCTV cameras to small retailers and Small and Medium-sized Enterprises such as shops, takeaways, bars and hairdressers. It also installed the CCTV cameras and undertook maintenance of them. The first defender was keen to expand and develop the business of ICU Europe. This involved *inter alia* research and development for a project involving Space & People which related to

remote monitoring and footfall counting and resulted in equipment being installed at the Braehead Motor Show, and subsequently at the Thistle Shopping Centre in Stirling. In spring 2007, ICU Europe were approached by First Response about the requirements of one of their clients, CCG Scotland Limited ("CCG"), a construction company, for CCTV cameras. First Response wanted a solution which they could sell to CCG which would have CCTV cameras on site instead of security guards, a new concept in the security industry. The first defender offered to install CCTV cameras and monitoring stations for First Response. He saw a business opportunity in remote monitoring for CCG. The first defender became the principal contact with CCG and ICU Europe provided cameras, which it also maintained, to CCG during the period between August 2007 and February 2009. During this period the first defender retained the ambition for ICU Europe to provide remote monitoring services to CCG. Mr Alam and Mr Shah and ICU Europe's financial adviser Mr Smith, who gave evidence, were aware of this ambition and of the potential profitability of the venture. At the end of 2008 and the beginning of 2009 ICU Europe monitored CCG sites in the Gorbals and Duke Street by remote monitoring from its office in Abercorn Street in Paisley to test its capabilities to provide that service. As a result of the first defender's endeavours ICU Europe built up substantial goodwill and a valuable business connection with CCG. By January 2009 there was a maturing business opportunity to obtain contracts for the supply of CCTV and monitoring services for CCG. The first defender also saw the possibility for remote monitoring for companies in Pakistan. At the end of 2008 and beginning of 2009 the defender and Mr Raza, who was at the time an engineer employed by ICU Europe, undertook a sales trip to Pakistan.

[3] ICU Secure was incorporated on 6 February 2009. CCG placed no further orders with ICU Europe after February 2009. The use of the name ICU Secure and the use of the

ICU Europe logo was an attempt to pass off ICU Secure as ICU Europe to secure the business of CCG. The first defender was the principal contact with CCG throughout. Prior to his sequestration in October 2009 the first defender transferred his shareholding in ICU Secure to the third defender. On 6 April 2011, after the discharge of the first defender from sequestration the third defender transferred the shareholding back to the first defender. Sitewatch Limited was incorporated on 3 February 2014. In June 2014 ICU Secure sold assets, including CCTV equipment, to Sitewatch Limited. After this sale, ICU Secure hired back this CCTV equipment from Sitewatch Limited in order to continue to provide services to its customers including CCG. I-Watchers Limited was incorporated on 19 September 2016. The sole shareholder of I-Watchers Limited is the first defender's brother Raquib Ibrahim. I-Watchers hired equipment from Sitewatch Limited in the same manner as ICU Secure had done previously.

[4] In short, on the basis of her findings, the sheriff found that the first defender was in breach of his duty owed to ICU Europe to avoid a conflict of interest in terms of section 175 of the Companies Act 2006 ("the 2006 Act") which he did by securing the incorporation of ICU Secure with a view to providing the same services to customers as ICU Europe had provided, or had a mature business opportunity to provide. She also found that the first defender was in breach of his duty to promote the success of ICU Europe in terms of section 172 of the 2006 Act. ICU Secure had been set up by the first defender as a vehicle to receive the benefits of a business opportunity belonging to ICU Europe and having knowingly received such benefit ICU Secure was liable to account to ICU Europe for all profits made as a consequence of the first defender's breach of his duties owed by ICU Secure. Further the first defender had deliberately evaded his duties to ICU Europe and deliberately sought to avoid those duties by interposing Sitewatch Limited, which he

controlled, and was used by him to perpetrate the breaches of his duties to ICU Europe. Likewise the first defender deliberately evaded his duties to ICU Europe and deliberately sought to frustrate those duties by interposing, following the liquidation of ICU Secure, I-Watchers Limited which he controlled notwithstanding that his brother Raquib Ibrahim was the sole shareholder. I-Watchers Limited was also used by the first defender to perpetrate breaches of the duties he owed to ICU Europe. As a result the first defender was also liable to account to the pursuer for the profits made by both Sitewatch Limited and I-Watchers Limited arising as a consequence of his breach of duty. The first defender not having acted honestly and reasonably and having had regard to all the circumstances of the case, the sheriff found that he was not entitled to relief in terms of section 1157 of the 2006 Act.

[5] The sheriff therefore repelled the defender's preliminary pleas and determined that the first defender was liable to account to ICU Europe for all profits made by ICU Secure, Sitewatch Limited and I-Watchers Limited from the conduct of business providing CCTV equipment, CCTV monitoring services and bespoke solutions to third parties from 6 February 2009 to the date of citation as a result of the first defender's breach of his duties to ICU Europe. ICU Secure was liable to account to ICU Europe for all profits made by it from the conduct of business providing CCTV equipment, CCTV monitoring services and bespoke solutions to third parties from 6 February 2009 to the date of citation as a result of the first defender's breach of his duties to ICU Europe. The sheriff ordained the first defender and ICU Secure to produce an accounting by 27 September 2019 of the whole profits derived from the first defender's breaches of duties to ICU Europe of the second defender from 6 February 2009 to 23 September 2016; ordained the first defender to produce an accounting by 27 September 2019 of the whole profits derived from the first defender's

breaches of duty to ICU Europe from 6 February 2009 to 23 September 2016 of (i) Sitewatch Limited from 3 February 2014 to date and (ii) I-Watchers Limited from 19 September 2016 to date; made provision for objections to said accounting; answers; adjustment; and fixed a case management discussion.

[6] The appeal proceeded on seven grounds:

(i) The sheriff erred in concluding that the actions by the first defender were in breach of his duties under sections 172 and 175 of the 2006 Act;

(ii) The sheriff erred in her assessment of the evidence and her findings were inconsistent with the evidence;

(iii) The sheriff erred in rejecting the evidence of the first defender, in the absence of any contrary evidence as regards his business activities, as to the incorporation of the second defender Sitewatch Limited and I-Watchers Limited;

(iv) The sheriff erred in her assessment of the evidence of the third defender and in rejecting as implausible the third defender's evidence in relation to the successful operation of ICU Secure. There was no basis for rejecting that evidence and no contrary evidence;

(v) The sheriff erred in finding the first defender could be made liable to account for profits made by others viz. ICU Secure, Sitewatch Limited and I-Watchers Limited. She ought to have concluded that any liability on the first defender could only extend to payments received by him;

(vi) The sheriff erred in finding the first defender liable to account for the profit of the second defender; Sitewatch Limited; and I-Watchers Limited (from certain business) up to the date of citation. Having so found she erred in ordaining the first defender to produce an accounting to a later date; and

(vii) E*sto* the sheriff was correct to find breach of duty established against the first defender, which was denied, she erred in refusing to relieve the first defender from liability under section 1157 of the 2006 Act. The sheriff took account of a factual situation which was inconsistent with the evidence. In all the circumstances the sheriff ought to have concluded that the first defender had acted honestly and reasonably and ought fairly to be excused.

[7] The first defender challenged certain findings in fact as inconsistent with the evidence. The first defender also challenged each of the sheriff's findings in fact and law.

[8] The cross-appeal is addressed by Sheriff Principal Turnbull in his opinion with which I agree.

First defender's submissions

[9] It was submitted that the sheriff had erred in concluding that the actions of the first defender were in breach of his duties in terms of sections 172 and 175 of the 2006 Act. The sheriff's findings were inconsistent with the evidence. The sheriff had proceeded on an erroneous understanding of both sections 172 and 175; of the circumstances of ICU Europe in the early part of 2009; and of what happened. The sheriff's conclusion in the final sentence of para [40] of her opinion that: "promoting the success of the pursuer … would have involved continuing to develop the opportunity for the pursuer and not diverting it elsewhere" failed to recognise the terms of section 172. Section 172 was enacted in order to preserve the existing law and the obligations owed by directors to protect the interests of creditors. Reference was made to the principles set out by Lord Hamilton in *Clydebank Football Club Limited* v *Charles Steedman & Others* 2002 SLT 109 at para [80]. It was asserted that the sheriff should have identified from the evidence that the financial position of ICU

Europe was such that the first defender was entitled to conclude as a director that ICU Europe could not continue to trade. The sheriff had failed to take proper account of section 172(3) which provides:

> "The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

It was recognised that there was no blanket duty on company directors not to trade whilst insolvent. That was seen in *Re CS Holidays Limited* [1997] BCC 172 whereby Chadwick, J stated at page 178:

> "Directors may properly well take the view that it is in the interests of the company and of its creditors, that, although insolvent, the company should continue to trade out of its difficulties. They may properly take the view that it is in the interests of the company and of creditors that some loss-making trade should be accepted in anticipation of future profitability. They are not to be criticised if they give effect to such view."

[10] What was in the best interests of the company was a matter for the judgement of the directors. The question of whether directors complied with section 172 is a subjective one, see *Birdi* v *Specsavers Optical Group Ltd and others* [2015] EWHC 2870 at paragraph 61:

> ".. the question being whether the director honestly believed that his act or omission was in the interests of the company (*Regentcrest plc* v *Cohen* [2001] 2 BCLC 80 at [120] per Jonathan Parker J); and even an unreasonable belief that a particular action was in the best interests of the company, does not put the director in breach of duty if the belief is honestly held (*Extrasure Travel Insurances Limited* v *Scattergood* [2003] 1 BCLC 598 at [97] (per Mr Jonathon Crow)."

It was therefore submitted that the question properly to be considered by the sheriff was whether the first defender honestly formed the view that ICU Europe had to close in early 2009. It was said that the evidence was to that effect. The sheriff ought to have rejected as not credible Mr Alam's evidence that he was willing and able to invest further funds in ICU Europe in early 2009 but he was not asked to do so by the first defender. There was clear evidence that the first defender had concluded on his return from a business trip

to Pakistan in January 2009 that the business had to close unless an investor from Pakistan would invest in it. The sheriff had erroneously discounted the evidence of the dire financial position of ICU Europe in early 2009. Further, evidence was given by Mr Smith that the business was not viable in February 2009 (Day 4 page 80). It had been explained by the first defender that the company no longer had any lease purchase business (Day 3 page 187) which was a significant part of its business. The credit crunch had ended that business because the financial providers were no longer providing finance to businesses of the sort which were ICU Europe's customers. The first defender himself had exhausted his opportunities to raise further finance having re-mortgaged his family home and a flat. No further funds were available to him. The only challenge to the first defender's evidence that the business had to close in early 2009, but for the possibility of investment from Pakistan, was that he had withdrawn from his bank account some £43,000 in a series of transactions after December 2008. The sheriff had failed to comment on why that had happened and the evidence was that the first defender had actually paid in an amount greater than the sum withdrawn, some £56,990 in 2009 alone. The sheriff had failed to take account of the first defender's explanation (Day 3, page 108 & 109 and 156). These transactions demonstrated the parlous financial state of the company and the immediate risk of failure. This evidence was not dealt with by the sheriff. As a result, the sheriff was in error. Her conclusion that the first defender breached section 172 because he had not developed an opportunity to provide monitoring services to CCG was inconsistent with the evidence that the company had to close. The sheriff improperly discounted the parlous nature of ICU Europe's finances which meant that it did not have the capacity or realisable opportunity to provide monitoring services to CCG. Absent the ability of the company to be in a position to benefit from the opportunity, there was no basis to conclude, as the sheriff had done, that the first

defender was in breach of his fiduciary duty. There could not be a breach of section 172 where the company could not have taken advantage of the opportunity.

[11] The first defender's counsel invited the court to review the evidence and reconsider the challenged findings in fact. Grounds of appeal (ii); (iii); and (iv) arose from material errors in the findings made by the sheriff. The sheriff had failed to take proper advantage of seeing the witnesses and was plainly wrong in her assessment of the evidence. Firstly, in accepting as credible the evidence of Mr Alam and Mr Shah, and of Mr Amir and Mr Raza, former employees of ICU Europe. Secondly, in rejecting the consistent accounts given by the first and third defender and other witnesses as to the ownership and control of ICU Secure, Sitewatch Limited and I-Watchers Limited.

[12] In relation to the sheriff finding Mr Alam to be a credible witness, the court was invited to consider, in particular, his evidence in relation to the allegation that at a meeting, in August 2012, he had demanded £150,000 from the first defender failing which he threatened to destroy ICU Secure. On the evidence of the first and third defender and Mr Shah he had lied when he denied that he had demanded £150,000 from the first defender failing which he would destroy ICU Secure. It was plainly wrong for the sheriff to have only considered this as a "discrepancy" in his evidence. It went to the heart of his credibility and reliability.

[13] There were other examples of Mr Alam's untruthfulness. He said he would have invested further in ICU Europe. (Day 1 page 61) That was contrary to the evidence of the first defender, which was corroborated by the third defender, that he had asked Mr Alam if he would invest further and his response had been that he did not have any money as he was on the verge of bankruptcy. The evidence of Mr Smith was that he had told Mr Alam about his conclusions about the viability of ICU Europe and the first defender and further

investment would be "throwing good money after bad". (Day 4 page 79) Mr Alam had lied when he stated Mr Smith had not told him this. (Day 1 page 148) Mr Alam's evidence that he was not aware there was anything wrong until June 2009 was incredible. Mr Alam had made the bizarre claim that monitoring was to be done from Pakistan because of gangsters. His evidence that monitoring commenced in 2007 and transferred to Pakistan in mid-2008 was incorrect. The evidence of the engineers was that it started in late 2008 or 2009. The work sent to Pakistan in 2008 related to the Space and People project. Mr Alam's evidence of when it moved to Pakistan and who was doing the monitoring was contradicted by many other witnesses. The evidence of Mr Alam was contradicted in so many instances by so many witnesses that the sheriff was in error in relying on his testimony.

[14] Aspects of the evidence of Mr Amir and Mr Raza were also incredible. Their independence was affected by their connection with ICU Europe and that they came to the UK as a result of connections with Mr Alam. It was also affected by the circumstances in which they ceased to work for ICU Secure. The first and third defenders gave evidence that Mr Amir and Mr Raza had sought an increase in their daily rate and when that was refused they opted to slow down their work rate and reduce their productivity. As a result, they were not given further work by ICU Secure. That cast doubt on the evidence of Mr Raza. Mr Raza was not credible when he stated that ICU Europe was awarded the CCG monitoring contract. Alastair Wylie the chairman and chief executive of CCG made it clear that the contract was with ICU Secure. All but one invoice (which was corrected) had been issued in the name of ICU Secure.

[15] In relation to the evidence of the third defender who gave evidence through an interpreter, it was suggested that difficulties arose because the interpreter seemed unfamiliar with business matters and business terms. It was submitted that the third defender had

given a clear account of how the business of ICU Secure came about, which was consistent with the account of the first defender. She was clear that ICU Secure was her business and explained her reasons for setting it up. (Day 4 pages 19-33) The third defender had identified some differences between the business models of ICU Europe and ICU Secure. Other than the monitoring activities undertaken in Pakistan the business was run from her home. It was suggested that the one area in which her evidence contradicted the evidence of the first defender (where she confirmed he had reasons to anticipate being sequestrated in February 2009) should have been treated as a strong positive indicator of her credibility and reliability. Her evidence should have been accepted by the sheriff and in rejecting that evidence the sheriff had fallen into error.

[16] Counsel for the first defender was critical of the sheriff in respect of various matters in which she was said not to have addressed the evidence which she had heard. These were in relation to her failure to deal with the evidence that the CCG contract was not a practical opportunity for ICU Europe because of (a) its debts; and (b) the fact that paid for monitoring would cost £72,000 per annum and that a general manager, such as the first defender, would cost £50,000 per annum. (Day 3, pages 63-65); The sheriff did not address the absence of personnel or payroll records held by ICU Europe for the three self-employed individuals who undertook monitoring work from late January 2009 before it was done by the third defender at home. The sheriff also failed to deal with the centrality of maintaining the engineer's work permits to the later history of ICU Europe. The first defender explained it was kept in existence to allow the transfer of work permits for Mr Ali and Mr Raza (Day 3 pages 40-41); that the evidence of Mr Raza and Mr Amir supported the first defender's account of the circumstances surrounding the transfer of work permits and the establishment of new businesses (Day 2, pages 29-30) and Mr Amir (Day 1, page 109). The

sheriff did not address the acquisition of the assets of ICU Secure by Sitewatch Limited for value, namely £125,000 plus VAT. The sheriff recorded this to have been "a complicated payment arrangement" which failed to recognise it was simply paid in two instalments. The sheriff did not deal with the evidence that the liquidator of ICU Secure considered whether the sale of Sitewatch Limited was for value; that the share price matched the book value of the assets (Production 5/44) and the liquidator's conclusion, as explained in the first defender's evidence, was that nothing wrong had been done (Day 3, pages 179-180). The sheriff erred in discounting Mr Khan's evidence which, despite the difficulty of a poor connection by video link from Islamabad, contained clear answers to important questions which supported the account given by the first and third defenders; in particular that ICU Secure was controlled by the third defender and not the first defender. The sheriff narrated that Robert Smith, a financial analyst, had given evidence. The sheriff recorded that his evidence was:

> "that he had told the first defender in 2008 that [ICU Europe} was not viable; further funding by credit cards was throwing good money after bad."

But she failed to record his evidence that he thought Mr Alam had taken on board the information he gave him that the company really was almost unsustainable and did not justify him putting further funds into the company (day 4 page 83-84) and he gave him direct advice not to fund it any further. The sheriff erred in rejecting the evidence of Raquib Ibrahim and by implication of Mr Wylie in relation to I-Watchers Limited. Mr Wylie gave evidence that CCG's main contact in I-Watchers Limited was the first defender's brother, Mr Raquib Ibrahim (Day 2, page 109). Mr Ibrahim's own evidence was that barring the initial introduction which was made by the first defender he dealt with and secured the business of CCG for I-Watchers Limited. He gave evidence of also working for ICU Europe

and ICU Secure and that he came from a business family. The finding of the sheriff that he had no business experience was contrary to the evidence, as was her conclusion that the principal I-Watchers Limited contact was with the first defender. The conclusion that Raquib Ibrahim was incapable of running a business was not one open to the sheriff on the evidence.

[17] In finding the first defender liable to account for profits made by ICU Secure, Sitewatch Ltd and I-Watchers Limited, the sheriff failed to respect the doctrine of separate legal personality. The liability to account can only exist for profits made by the first defender and not profits made by others unless it is brought under some other head of liability (see *Regal (Hastings) Limited* v *Gulliver* [1967] 2 AC 134). In this case the claim for accounting can be pursued only for a breach of fiduciary duty. The sheriff was in error in concluding that she was entitled to pierce the corporate veil so as to allow her to find the first defender liable to account for the profits of all three companies. There was no basis in the evidence to find that the first defender had been involved in the incorporation of Sitewatch Limited and I-Watchers Limited and therefore no basis on which to find any liability to account for their profits. In *Prest* v *Petrodel Resources Limited* [2013] 2 AC 415 the Supreme Court reviewed the law in relation to piercing the corporate veil. Lord Sumption in his judgment emphasised that the circumstances in which the corporate veil may be pierced arise where a person who owns and controls the company is, for specified purposes, identified in law with the company by virtue of that control and ownership thus constituting an exception to the principle of separate legal personality. Following his analysis of the previous case law, Lord Sumption concluded that the cases were governed by two principles: "the evasion principle" and "the concealment principle". The evasion principle arises where a person is subject to an existing legal obligation, liability or restriction which is

evaded or frustrated by interposing a company under his control. Where that occurs, the court can disregard the separate legal personality of the company to the extent necessary to deprive the company or its controller of the advantages he has obtained. Thus piercing the veil involves identification of the company and the person with the ability to control it. The first defender had never owned shares or been a director of Sitewatch Limited or I-Watchers Limited. He had only had a shareholding in ICU Secure for a brief period shortly after its incorporation before transferring that shareholding to the third defender, at which stage he resigned as a director, leaving the third defender as the sole director. Subsequently on 6 April 2011, in the light of tax advice, the third defender had transferred half the shares in the company back to the first defender. The consistent evidence of the first defender and the third defender was that ICU Secure was the third defender's company and she was in control of it. Absent any directly contrary evidence it was not open to the sheriff to reject that evidence as she had done.

[18] In relation to I-Watchers Limited there was no evidence but that Raquib Ibrahim owned and controlled the company. The sheriff was in error therefore in holding that the first defender was in control of ICU Secure, Sitewatch Limited and I-Watchers Limited and there was therefore no basis for the sheriff to find the first defender liable to account for their profits. If there was to be a claim that ICU Secure, Sitewatch Limited or I-Watchers Limited had profited from the first defender's breach of section 172 and / or section 175 of the 2006 Act then any claim would properly lie directly against those companies.

[19] If the sheriff was entitled to find breaches established against the first defender, which was denied, she erred in refusing to relieve him from liability under section 1157 of the 2006 Act. The sheriff ought properly to have concluded that the first defender acted honestly and reasonably and was therefore entitled to indemnity against claims arising from

knowledge which he had acquired while a director and employee of ICU Europe. That is because ICU Europe was not in a position to have exploited those opportunities as it did not have the financial resources to do so. It was insolvent at the material time in early 2009 and there was no prospect of funds being found to enable it to trade out of its difficulties. It was not possible for ICU Europe to stay in business and not therefore possible for them to develop their business by providing monitoring services to CCG. The sheriff should have accepted the evidence that its liquidation was postponed only to secure the transfer of visas for Mr Amir and Mr Raza. She failed to take account of the fact that ICU Europe Technology Limited had been set up by Mr Ali and Mr Raza so they could continue to act as engineers, as they had done for ICU Europe, installing and maintaining CCTV cameras. She was also in error in failing to accept the evidence that Mr Alam was fully aware of the incorporation of ICU Secure. These were all material reasons which supported the first defender being granted indemnity in terms of section 1157. The sheriff had therefore failed to take account of relevant matters in exercising her discretion not to grant relief under section 1157 and her decision should be set aside and was at large for this court. If proper account was taken of these various matters then the court should grant the first defender relief under section 1157.

[20] The final ground of appeal related to the terms of the interlocutor that the first defender had a liability to account to the pursuer for all profits made by ICU Secure, Sitewatch Limited and I-Watchers Limited from 6 February to the date of the interlocutor, 13 August 2019. The sheriff had only found that the first defender's liability should extend to the date of citation. Having determined that, the accounting should only have been ordered for the same period and not to the date of the sheriff's interlocutor. The sheriff was therefore in error in ordering an accounting in relation to ICU Secure to 23 September 2016

and in relation to Sitewatch Limited and I-Watchers Limited to the date of her interlocutor, 13 August 2019.

[21] The sheriff's findings in fact and law should not stand for the reasons enumerated. If the court accepted the first defender's argument her findings in fact and law should be deleted and reconsidered by this court on the basis of the alternative findings in fact proposed. In particular ICU Secure was incorporated on the instructions of the third defender, as the sheriff found in finding in fact 44. That it was the third defender's business followed from finding in fact 44, a finding which was not challenged. ICU Europe and ICU Secure were not in competition because their businesses were different. ICU Europe installed and sold CCTV equipment. ICU Secure provided a remote monitoring service. ICU Europe was unable to continue trading. The CCG opportunity was not therefore available to ICU Europe. Sitewatch Limited was not controlled by the first defender. It was controlled by the third defender. I-Watchers Limited was not controlled by the first defender, it was controlled by Raquib Ibrahim.

[22] The first defender adopted his written submissions and invited the court to allow the appeal, to recall the interlocutor of 13 August 2019 and assoilzie the first defender from all craves.

Submissions for the respondent

[23] The respondent's solicitor adopted his note of argument and written submissions. The court was invited to refuse the appeal and adhere to the sheriff's interlocutor of 13 August 2019, subject, given the passage of time, to the consequent variation of the procedural dates set. The appeal was identified as primarily involving a challenge to the sheriff's findings in fact. It was submitted that nothing in the grounds of appeal or

submissions made by the first defender came close to specifying the grounds on which the sheriff's assessment of the facts ought to be interfered with. It was well established that the judge at first instance is the person best placed to assess the evidence, having seen and heard that evidence. An appellate court should only interfere with findings on the evidence if the appeal court is satisfied that the judge at first instance reached a decision which could not reasonably be explained or justified. It was submitted that the appeal was advanced without a responsible basis because there was nothing in the grounds of appeal, or note of argument, which would allow the court to conclude that the sheriff was plainly wrong on any issue of fact. The conclusions arrived at by the sheriff were conclusions which were open to a sheriff at first instance acting properly and reasonably. The sheriff made no critical finding in fact that did not have a proper basis and the sheriff did not misunderstand or fail to consider relevant evidence.

[24] The sheriff made findings in fact in relation to the formation of ICU Secure, namely findings in fact 40 to 45. ICU Secure was incorporated on 6 February 2009. The first defender was a director and shareholder on incorporation until his resignation on 20 February 2016, at which point his shareholding was transferred. The third defender was also a director and shareholder on incorporation, and had asked the first defender to set up ICU Secure, but she had no previous business experience. The first defender dealt with VAT registration, the setting up of bank accounts and insurance policies. At proof the contention that it was the third defender who identified that there was a business opportunity for security monitoring if a new funding and operational model was introduced resulting in the formation of ICU Secure was simply not accepted by the sheriff. These findings led to finding in fact 46 which was a critical finding that the first defender was the person in control of ICU Secure.

[25] The sheriff reviewed the evidence at paras [13] to [32]. The sheriff narrated:

"[13] Mr Alam and Mr Shah were not impressive witnesses. "

However she explained that she had reached many of her findings on material matters because the first defender was very much "running the show". There was a flavour that some of the vagueness in the provision of the monitoring service may have arisen from the need for registration of those undertaking monitoring services but the matter was not investigated in any detail in the course of the evidence before the sheriff. Critically, the sheriff narrated that she accepted Mr Alam's evidence that he had no knowledge of the incorporation of the second defender, and his denial that he had been told this by the first defender. The sheriff further explained that her acceptance of Mr Alam's evidence on many of the critical issues resulted from the supportive evidence given by Mr Amir and Mr Raza, whom she found to be credible witnesses.

[26] The sheriff set out her assessment of the first defender's evidence at paras [22] to [25] of the Note. In doing so, she did not expressly reject his evidence, but she made reference to the contrary evidence which she accepted. It was clear she did not accept the evidence of the first defender. There is no proper basis for this court to overturn that assessment. The appeal was dependent on this court doing so, without that the appeal was bound to fail.

[27] Mr Alam's evidence that monitoring was carried out by ICU Europe was also supported by the credible and reliable witnesses Mr Amir, Mr Raza and Mr Tassawer. The sheriff accepted the evidence from Mr Raza that monitoring was carried out from Abercorn Street, Paisley at the end of 2008 by three people brought in part-time and continued until they were told that ICU Europe could not survive. She also accepted his evidence that the monitoring was of CCG sites in the Gorbals and at Duke Street. Mr Tassawer, who was identified by Mr Raza as one of those carrying out monitoring services, spoke to

undertaking monitoring of construction sites in the Gorbals, Jamaica Street and Duke Street, for a period of 3 weeks in January and February 2009 from Abercorn Street, Paisley. The third defender herself gave evidence that monitoring was carried out before the incorporation of ICU Secure. There was therefore ample material which entitled the sheriff to reach the view that she did, that ICU Europe had undertaken monitoring for CCG.

[28] The sheriff did not err in the assessment of the evidence of Mr Alam, Mr Shah, Mr Amir and Mr Raza. The sheriff, having heard their evidence, was best placed to make an assessment of their evidence and to reach a view on the evidence to be preferred where that differed from the evidence of the first and third defender. It was of note that the first defender did not identify any matter in which it was said Mr Shah, Mr Raza or Mr Amir were untruthful.

[29] It was of particular note that the evidence of Mr Raza, which the sheriff accepted as being credible and reliable, was to the effect that ICU Secure was incorporated for the purpose of defeating the interests of creditors and not, as sought to be maintained in the first defender's submissions, with a view to securing the transfer of work permits for Mr Ali and Mr Raza. As a matter of fact, notwithstanding his evidence that ICU Europe was in a parlous state in January 2009, the first defender had not shut down the company at that time and had withdrawn significant sums amounting to more than £40,000 in the period to June 2009. The pursuer's contention that he had paid significant sums into ICU Europe only emerged in the course of his re-examination and the sheriff was entitled to reject that evidence. Such a critical chapter of evidence might have been expected to be front and centre of the first defender's case and not an apparent afterthought. There were no findings made of money having been returned to ICU Europe by the first defender and there was no submission made by the first defender that such a finding in fact should be added by this

court. It was also noted that there was no case on record that ICU Europe had to close in January 2009 in the best interests of its creditors. The sheriff had properly rejected the first defender's evidence in re-examination that he had made payments into ICU Europe after December 2008. He had produced no documentary evidence to support his belated contention that he was the source of various credit entries found in the bank statements of ICU Europe. The source of the funds could not be ascertained from the credit entries. No evidence had been given by the first defender that he had regard to the interests of the creditors of ICU Europe. In these circumstances it could not be said that the sheriff's failure to accept that evidence resulted in her falling into error. There was no basis therefore for this court to interfere with the sheriff's judgment in that regard.

[30] In para [15] of her Note the sheriff records that Mr Alam's evidence was "disjointed and did not really make sense", however, none of his evidence was really material to the real dispute. It was submitted that Mr Alam's evidence in relation to the meeting in August 2012 and the threats said to have been made against the first defender was in that category and was irrelevant to the matters in dispute. The submission of the first defender that if Mr Alam's evidence about that meeting was not to be relied upon it therefore vitiated the rest of his evidence was misconceived.

[31] There was a sound basis for the sheriff to make the findings in fact which she had and there was no proper basis for this court to interfere with those findings. The findings in fact made by the sheriff provided a sound basis for her findings in fact and law. The wholesale recasting of the sheriff's conclusion on the evidence advocated for by the first defender was not warranted.

[32] The sheriff was entitled to conclude on the evidence before her that the first defender controlled ICU Secure, Sitewatch Limited and I-Watchers Limited. The third defender did

not have any contact with CCG, ICU Secure's principal customer, and Mr Wylie did not know the third defender. The sheriff was correct to reject the evidence of the first defender, the third defender and Raquib Ibrahim as being neither credible nor reliable. The first defender by his own admission set up ICU Secure. He was a director of ICU Secure at the outset and was a fifty percent shareholder either side of his sequestration. He had the critical relationship with CCG and he had the relevant experience. In his affidavit he confirmed that he participated in the decision-making relative to ICU Secure.

[33] With regard to Sitewatch Limited's acquisition of the assets of ICU Secure the evidence disclosed a highly questionable transaction whereby ICU Secure had transferred the assets without initial consideration, then rented the equipment from Sitewatch Limited with Sitewatch Limited purporting to pay ICU Secure for the equipment, using the proceeds of rent paid by ICU Secure. The sheriff was entitled to describe that as "a complicated payment arrangement".

[34] The evidence of Fahad Khan, taken by video link, was largely incomprehensible and he could neither be examined nor cross-examined satisfactorily. The sheriff did not err in her treatment of his evidence which was in any event irrelevant. The sheriff was also entitled to reject the evidence of Raquib Ibrahim. Her conclusions in that regard were reasonable and appropriate and not open to challenge before this court.

[35] The third defender was not a credible or reliable witness and the sheriff was entitled to find that to be the case. There was substantially contrary witness and documentary evidence to the third defender's account of events. As the sheriff correctly observed in para [28] of her Note the third defender's evidence that she owned and ran the second defender was contradicted by evidence which showed that she had no personal contact with CCG, knew nothing of their business, had no previous involvement in the business of CCTV

cameras or remote-view monitoring, had no business experience and relied on the first defender to set up ICU Secure. In any event, the third defender's evidence was that she knew ICU Europe had obtained contracts for the supply of CCTV equipment and monitoring services to CCG and she assisted the first defender in diverting that opportunity using ICU Secure as a vehicle.

[36] The sheriff decided correctly that the first defender was liable to account for profits made by ICU Secure, Sitewatch Limited and I-Watchers Limited. A fiduciary who breaches his fiduciary obligations is liable to account to his principal for the profit made by him (directly or indirectly) from such a breach (see *Inglis* v *Inglis* 1983 SC 8 and *CJC Media (Scotland) Ltd* v *Sinclair* [2019] CSOH 8). Where a person is under an existing obligation or legal liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control the court may then "pierce the corporate veil" for the purpose of depriving the company under its control of the advantages that were otherwise obtained by the company's separate legal personality: see *Prest* and *Ashley* v *The Scottish Football Association Ltd* [2016] CSOH 78. The sheriff had correctly decided as a matter of fact that the first defender controlled ICU Secure, Sitewatch Limited and I-Watchers Limited and interposed them as devices to evade his duties to ICU Europe. For the reasons explained these findings were open to the sheriff on the evidence and, on the basis of those findings, the sheriff was entitled to find the first defender was liable to account for all profits made by ICU Secure, Sitewatch Limited and I-Watchers Limited from the conduct of business providing CCTV equipment and CCTV monitoring services and to produce an accounting of the whole profits of the first defender's breaches of his duty.

[37] There was no reliable specific evidence before the court which would have allowed the sheriff to conclude that ICU Europe had failed financially and required to cease business. No balance sheet or list of creditors for ICU Europe for the relevant times was produced or spoken to by any witnesses. Advice given by Robert Smith was given in ignorance of the pursuer having an opportunity to provide monitoring services to CCG. The evidence showed, and the sheriff properly determined, that the pursuer had aspired for some time to provide monitoring services to CCG and the pursuer had in fact begun to provide those services. The pursuer was able to continue business until July 2009 having made payments of over £40,000 to the first defender between December 2008 and June 2009. Even if the factors identified in the grounds of appeal, submissions and note of argument for the first defender had been established, which they were not, the sheriff would not have been entitled to find that the first defender acted honestly and reasonably. The opportunity to contract with CCG was extremely valuable as the first defender fully appreciated (findings in fact 67, 54, 63 and 66). The first defender had in fact profited significantly from the diversion of the opportunity and it was obviously unreasonable for the first defender to seek to profit from the opportunity to contract with CCG.

[38] The sheriff did not err in law in ordaining the first defender to account for the whole profits deriving from breaches of duty to dates later than the date of citation. The sheriff correctly found that the first defender's breaches of duty continued beyond the date of citation and the sheriff was entitled to make the orders which she did and those orders are supported by her findings in fact and her findings in fact and law.

Decision

[39] The appeal is predicated on the basis that the sheriff has fallen into error and having made findings in fact which this court should overturn. The appeal seeks to challenge the sheriff's findings in the light of her assessment of the witnesses and their evidence. It has been well-recognised since *Clarke* v *Edinburgh and District Tramways Co* 1919 SC (HL) 35 and reinforced by the more recent decisions of the Supreme Court in *McGraddie* v *McGraddie* 2014 SC (UKSC) 12 and *Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203 that where the trial judge has had particular advantages in having seen and heard the witnesses an appellate court should only interfere with the findings of the trial judge if they are unsupported by the evidence and plainly wrong. In the words of Lord Thankerton in *Thomas* v *Thomas* 1947 SC (HL) 45 at 54

> "an appellate Court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial Judge's conclusion."

[40] I consider that the sheriff could have been more expansive in her analysis of the evidence and provided more reasoning to explain the findings in fact which she made. I also consider that she might have been more comprehensive in her explanation of the reasons she declined to make certain findings in fact she had been invited to make. She could also have been more direct in her rejection of much of the evidence of the first defender and third defender. Where the fact finder does not accept the evidence of a witness this should be clearly expressed and a brief explanation provided for that conclusion. These omissions provided a pathway for the pursuer to proceed with the appeal.

[41] The sheriff identified four main evidential questions which she required to answer: what was the nature of the business conducted by ICU Europe, and did the pursuer have the opportunity to provide monitoring services to CCG? Was that opportunity in fact taken up by ICU Secure? What was the first defender's role in ICU Europe and ICU Secure? What were the roles of the third defender and Raquib Ibrahim, the first defender's brother, in ICU Secure, Sitewatch Limited and I-Watchers Limited?

[42] In addition I identify the following matters which were disputed and which required to be determined by the sheriff: Had ICU Europe provided monitoring services to CCG? What was the extent of the financial difficulties faced by ICU Europe in early 2009 and did these financial difficulties remove the opportunity for ICU Europe to take advantage of the business opportunity of providing monitoring services to CCG? If ICU Europe was in financial difficulty why was there a delay in the company being placed in liquidation? Was Mr Alam told about the incorporation of ICU Secure by the first defender around the time of its incorporation? Who was responsible for setting up ICU Secure and who was its controlling mind? Who was the controlling mind of Sitewatch Limited and I-Watchers Limited?

[43] It is apparent from the sheriff's Note and the transcripts that there was a significant and often irreconcilable conflict between the main protagonists, Mr Alam and the first defender. The sheriff did not did not accept the evidence of the first defender. She comments on his evidence in paras [22]-[25]. I do not accept the first defender's proposition that the sheriff accepted Mr Alam to be a credible witness. The sheriff comments on the evidence of Mr Alam and Mr Shah in paras [13]-[18]. She stated in terms that she did not find Mr Alam or Mr Shah to be impressive witnesses. She however indicated that on the

main topics under dispute she found their evidence to be credible and reliable, but this was caveated by the qualification except where this was inconsistent with any of her findings.

[44] The first defender's position was that the sheriff had failed to take proper advantage of seeing the witnesses and was plainly wrong in her assessment of the evidence. Firstly, in her accepting as credible the evidence of Mr Alam and Mr Shah and of Mr Amir and Mr Raza, employees of ICU Europe. Secondly in rejecting the consistent accounts given by the first and third defender and other witnesses as to the ownership and control of ICU Secure, Sitewatch Limited and I-Watchers Limited, especially where there was no contrary evidence. In relation to the evaluation of the evidence of Mr Alam, the court was invited to consider in particular his evidence in relation to the allegation that he had demanded £150,000 from the first defender failing which he would "destroy" ICU Secure.

[45] I accept that the sheriff might have been more fulsome in her discussion of the evidence relating to the meeting in August 2012, and in particular, the reasons for her conclusions as to how it impacted on the reliability of the evidence of Mr Alam and the first defender in relation to material matters. That said, I do not consider the sheriff's failure to do so is, as was contended for by the first defender, a basis to reject Mr Alam's evidence in its entirety on the basis that he had "lied" regarding the demand for £150,000 and the threat to destroy ICU Secure. The rejection of a particular piece of evidence given by a witness is a matter which may be taken into account in the evaluation of their credibility and reliability, but I reject any contention that the rejection of such evidence has the necessary consequence of invalidating the remaining evidence of that witness.

[46] I turn to consider the evidence in relation to what I have identified as the critical questions. In relation to the question of whether ICU Europe provided monitoring services to CCG the sheriff notes that, although he was vague on detail, she was satisfied that

Mr Alam was credible when he said that he was aware that monitoring was taking place for the benefit of CCG from Abercorn Street. The monitoring arrangements were also spoken to by Mr Amir, Mr Raza and Mr Tassawar. Contrary evidence was given by Mr Wylie who when shown a copy of an invoice from ICU Europe detailing monitoring services stated that that was not his understanding of the position and when it was put to him he accepted the invoice may have been issued in error. That evidence does not entitle this court to consider that the view which the sheriff took of the evidence being plainly wrong. There is no basis not to accept the sheriff was entitled to make finding in fact 30. It also follows that I accept that ICU Europe had, through the first defender, been making plans and testing monitoring services for CCG in late 2008 and 2009 and built up substantial goodwill.

[47] The first defender did not seriously contest that there was an opportunity to provide monitoring services to CCG or that he had developed substantial goodwill and a valuable business connection with CCG for ICU Europe. Neither was there any dispute that ICU Secure had provided CCTV equipment and remote view monitoring to CCG (finding in fact 47). I accept that the sheriff was entitled to make finding in fact 35. The first defender's argument to avoid being found to be in breach of section 175 was that ICU Europe's financial position was such that it was unable to take advantage of the opportunity. The first defender maintained that ICU Secure operated through a different business model, with the monitoring being done by the third defender's family in Pakistan and the first defender not receiving a salary which allowed ICU Secure to monopolise the opportunity to provide services to CCG. He also argued that it was the third defender who saw the business opportunity and established ICU Secure. Having regard to the sheriff's Note and having reviewed the transcript I do not find that the sheriff was plainly wrong in her conclusions that the first defender by his actions diverted the business opportunity to ICU Secure.

[48] Neither do I consider that the sheriff may be said to be plainly wrong in her finding that the first defender controlled ICU Secure. It was clearly open to the sheriff to reject the evidence of the third defender about her identification of the business opportunity to develop monitoring services for CCG. She had no previous business experience; the first defender registered the company and dealt with VAT, he was initially a shareholder then transferred his holding to the third defender which was then transferred back to him following his discharge from sequestration; and a substantial pension payment for him was made by ICU Secure. All of the foregoing evince support for the first defender's active involvement in ICU Secure and entitled the sheriff to reach the conclusion that the first defender's evidence about ICU Secure was implausible and that he controlled the business. The fact the first and third defender gave supportive evidence does not mean that evidence must be accepted. I reject the first defender's contention that, absent any contradictory evidence, the evidence for the first defender required to be accepted. It was not in dispute that the first defender was a director and shareholder of ICU Secure on incorporation, and that the third defender had no previous business experience. The sheriff found that after his resignation, stated in finding in fact 45 to have been 20 February 2016, (I surmise this is a typographical error and should be 2009), he continued to control the company. I find no basis to interfere with any of these findings save to correct the typographical error. I do not find there to be a basis to find that the sheriff was plainly wrong to reject the evidence of the first and third defender that the first defender was not in control of ICU Secure.

[49] Having reviewed the transcripts I observe that there was little by way of evidence to support the position of the first defender about the parlous financial state of ICU Europe. I also note that the sheriff in findings in fact 57 and 58, (challenged only to the extent of the

payments made) found that the first defender and other employees continued to receive payments from ICU Europe.

[50] The first defender relied heavily on the argument that it was not possible for ICU Europe to continue in business as a result of its financial circumstances and that it required to cease trading. In these circumstances it was not possible for it to develop monitoring services and, given that was the first defender's honestly held view of the position, he could not be found to be in breach of section 175 as no loss was sustained by ICU Europe. It could not have successfully pursued the business opportunity to provide monitoring services to CCG.

[51] The sheriff did not make a finding in fact which addressed the first defender's position that ICU Europe was not deprived of the opportunity to deliver monitoring services to CCG because it did not have the financial resources to take advantage of the opportunity. She addressed the matter rather obliquely and briefly in para [43] of her Note. She stated:

> "He [the first defender] refused to accept that the fact the employees and he himself had been paid until June 2009 meant that the pursuer had the resources to service the work."

That sentence makes it tolerably clear that she did not accept that the evidence gave a valid basis to conclude that the opportunity could not be taken up by ICU Europe, because of its financial positon. It is clear she had concerns that the explanations for the delay in winding up ICU Europe, said to arise from the wish to procure transfers and work permits for Mr Ali and Mr Raza, did not provide the full story. She was also clearly sceptical of the evidence provided in re-examination by the first defender that he had paid in more money than he had taken out in the early months of 2009. As was pointed out by the respondent, the averments relating to the withdrawal of funds from ICU Europe had been made from the outset of the action, but no documentary evidence on the first defender having made

payments into the company was produced. I do not therefore accept the contention of the first defender that the financial position of ICU Europe was such as to mean that it was unable to take advantage of the opportunity to provide monitoring services to CCG. Neither do I accept the first defender's argument that he honestly held that view and that he acted in the manner he did from his duty to the creditors of ICU Europe, given the delay in steps being taken to place the company in liquidation. The sheriff's sceptical view of the explanation for the delay in that being done is perfectly understandable.

[52] In a situation as in this case where there is evidence of witnesses which is directly contradictory it is inevitable that the observation of the witness giving evidence and the resultant opportunity to evaluate the dynamics of the presentation of evidence provides the fact finder with an advantage as against simply reading the transcript. The principal additional material which the first defender directed this court to was the schedule of payments made by the first defender to ICU Europe which it was said supported the first defender's position on the precarious financial position of ICU Europe and demonstrated that, rather than having withdrawn funds from ICU Europe in early 2009, he had in fact put money into the business. I do not find the schedule to be of assistance. It does not identify the source of the funds. I also find there to be some force in the submissions made on behalf of ICU Europe that the way in which details of payments made by the first defender into the company arose in the course of cross-examination and the lack of documentation vouching the payments and their source gave grounds for the sheriff to doubt the reliability of the first defender's evidence.

[53] A critical piece of evidence from Mr Alam was whether he had knowledge of the incorporation of ICU Secure a matter relevant for consideration of whether a defence of authorisation had been made out in terms of section 175 of the 2006 Act. Whether Mr Alam

had that knowledge may also be relevant in the context of section 1157 of the 2006 Act. The sheriff identified that there were difficulties with Mr Alam's evidence but nonetheless accepted in para [17] that he did not know about the incorporation of ICU Secure. Although not stated by the sheriff in terms she must therefore have determined that she could not rely on the contrary evidence of the first defender that Mr Alam had indicated that he had no objection to the incorporation of ICU Secure. It would have been preferable had she stated that in terms. But in any event I am not satisfied that there is any basis within the transcripts which would entitle the court to interfere with the sheriff's conclusions in para [17].

[54] The sheriff found that the first defender controlled both Sitewatch Limited (finding in fact 75) and I-Watchers Limited (finding in fact 84). Her reasoning is set out in para [56]. In that paragraph she expresses her scepticism of the first defender's account and that she had doubts about the reliability and credibility of the third defender and Raquib Ibrahim. Those conclusions must, in my view, clearly be given due regard in light of the advantages afforded to the first instance judge who heard the evidence. While less is recorded in the Note about the arrangements for I-Watchers Limited this followed the model which had been followed with Sitewatch Limited and there was a basis for the sheriff to make the findings in fact she did. Again the sheriff might have been more expansive in explaining her reasoning for rejecting the evidence of the first defender, but I cannot say that she was plainly wrong in doing so and, paying due deference to the fact finder, there is no basis for the court to interfere with the sheriff's findings that the first defender was the person in control of ICU Secure, Sitewatch Limited and I-Watchers Limited.

[55] Although I have identified various criticisms of the sheriff's judgment I am satisfied that the sheriff does provide a sufficiently reasoned judgment to explain the findings in fact which she made. It is the primary role of the fact finder at first instance to make an

assessment of the evidence and I cannot say that the sheriff was plainly wrong not to accept the evidence of the first defender and his witnesses and to prefer the evidence of the other witnesses. I do not therefore find a basis upon which the court is entitled to interfere with the findings made by the sheriff. I should add that I am fortified in that conclusion as a result of our detailed consideration of the transcripts. Although a review of the transcripts does not afford the appeal court an opportunity to observe the witnesses' demeanour when giving their evidence, it does provide a basis for the appeal court to consider the differences and areas of conflict which arise from the evidence. My analysis of the transcript supports the conclusions reached by the sheriff. I am in no doubt that the evidence provided a basis for the sheriff's findings in fact on the critical matters which are referred to above, namely, that significant time and resources were spent by the first defender in building up business connections with CCG in order for ICU Europe to have the opportunity to contract with CCG for the provision of CCTV equipment and CCTV monitoring services; that ICU Europe had provided monitoring services for CCG; that the first defender diverted that opportunity away from ICU Europe; and that Mr Alam was not told about the incorporation of ICU Secure by the first defender around the time of its incorporation.

[56] I further accept that the findings of the sheriff provide a proper basis upon which she was entitled to conclude that the first defender was in breach of section 172 and section 175 of the 2006 Act. I therefore also accept finding in fact and law 95 and 96 should stand.

[57] Given the findings of the sheriff, which I accept, the conduct of the first defender was such as entitled the sheriff to refuse to grant him relief from liability under section 1157 of 2006 Act. Those findings are incompatible with the suggestion that the first defender acted honestly and reasonably and ought fairly to be excused, indemnified and granted relief from liability. Indeed, I note that finding in fact 48, which was not disputed, identified that ICU

Secure's paperwork closely resembled that of ICU Europe – a matter not further commented on by the sheriff, but in my view which allows for an inference to be drawn that there was some attempt to camouflage the change in provider. That inference is also one which would support a lack of honesty on the part of the first defender. Taking due account of these factors I further accept that the sheriff was entitled to find that the first defender was not acting honestly and reasonably and in those circumstances she was entitled to refuse to grant him indemnity in terms of section 1157 of the 2006 Act.

[58] The next matter to be determined is whether the sheriff had a proper basis in law to find that the first defender should be held liable to account for the profits of ICU Secure, Sitewatch Limited and I-Watchers Limited which have been made as a result of the breach of the first defender's obligations to ICU Europe. That leads to the question of whether the sheriff's findings give rise to circumstances where it is appropriate to pierce the corporate veil of ICU Secure, Sitewatch Limited and I-Watchers Limited and to extend liability to profits made by those companies. I adopt the summary of the legal position of the circumstances in which the court may pierce the corporate veil, as analysed by Lord Sumption in *Prest* and followed by Lord Brodie in *Ashle*y at paragraph 30:

> "when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control, the court may then 'pierce the corporate veil' for the purpose of depriving the company or its controller of the advantage that they would have otherwise obtained by the company's separate legal personality."

[59] The starting point is the finding that the first defender controlled all three companies. That, when looked at alongside the findings that the first defender was in breach of his obligations in terms of sections 172 and 175 of the 2006 Act and that he had not acted honestly and reasonably, is sufficient to conclude that the first defender was by his actions in

breach of his fiduciary obligation to ICU Europe. Were the corporate veil not to be pierced there would be a likelihood of him evading his responsibilities. I therefore accept that where, as here, the sheriff found the first defender to have acted improperly and when she found him to be in control of ICU Secure, Sitewatch Limited and I-Watchers Limited she was entitled to pierce the corporate veil.

Disposal

[60] I am therefore minded to refuse the appeal. Given the passage of time there is a requirement to adjust the timetable imposed by the sheriff in her interlocutor of 13 August 2019. The interlocutor should be modified to provide that the first defender must produce an accounting by 14 January 2021; ICU Secure should lodge objections by 18 February 2021; with answers in response by the first defender by 25 March 2021; and a case management conference to proceed by telephone on a date to be thereafter assigned by the sheriff in early April 2021. Except as so modified I would adhere to the interlocutor of the sheriff of 13 August 2019.

[61] All parties sought sanction for counsel and invited us to proceed on the basis that expenses should follow success. I would sanction the appeal and the cross-appeal as being suitable for the employment of junior counsel. The appeal having been refused I would find the first defender liable to ICU Europe in the expenses of the appeal. I agree with the opinion of Sheriff Principal Turnbull in relation to the cross-appeal. The cross-appeal having being unsuccessful I would find ICU Europe liable to the third defender for her in expenses in respect of the cross-appeal.

SHERIFF APPEAL COURT

GLW-CA30-19

Sheriff Principal D L Murray
Sheriff Principal C D Turnbull
Appeal Sheriff W H Holligan

OPINION OF SHERIFF PRINCIPAL C D TURNBULL

in appeal by

MOHAMMED AQEEL ALAM and TAHIR SHAH,

on behalf of ICU (EUROPE) LIMITED

Pursuer and Respondent

against

SAQUIB IBRAHIM

First Defender and Appellant

ICU (SECURE) LIMITED

Second Defender

and

SADIA IBRAHIM

Third Defender and Respondent

Pursuer and Respondent: A W MacKenzie, solicitor; Harper Macleod LLP
First Defender and Appellant: C C Wilson, advocate; Balfour & Manson LLP
Second Defender: No appearance
Third Defender and Respondent: G Dewar, advocate; Thorley Stephenson Ltd

1 December 2020

[62] I have had the advantage of reading in draft the opinion of your Lordship in the chair. For the reasons given by your Lordship I too would refuse the appeal.

Introduction - cross-appeal

[63] ICU Europe cross-appeal against the sheriff's interlocutors of 6 July 2018 (refusing to admit to probation the averments in support of ICU Europe's then case against the third defender); and of 31 August 2018 (refusing to allow ICU Europe's minute of amendment to be received). The former interlocutor (being *inter alia* one which allowed parties a proof before answer) was appealable without leave. No appeal was taken by the pursuer and respondent within the requisite period. At no time did the pursuer and respondent seek permission to appeal the latter interlocutor. The cross-appeal was not lodged until 17 December 2019, subsequent to the sheriff's decision following proof, a proof in which the third defender (the respondent in the cross-appeal) did not participate.

Submissions in relation to the cross-appeal

[64] ICU Europe argue that the sheriff erred in law in concluding that they had not pled a relevant and specific case against the third defender. They maintain that they had averred relevant facts supporting its case against the third defender; in particular the third defender's (alleged) knowing assistance and participation in the first defender's (subsequently established) breaches of duty. ICU Europe argue that, in any event, the sheriff erred in law in refusing to allow their minute of amendment to be received, on the basis that their proposed case against the third defender (incorporating the amendment) was

sufficiently relevant and specific to be admitted to probation; and that the proposed minute of amendment was necessary to resolve the main question in dispute between the parties.

[65] The third defender's initial position in respect of the cross-appeal was that it was incompetent: first being made out with the period within which an appeal was required to be made and second on the ground of mora, taciturnity and acquiescence. In any event, the third defender argued that the sheriff's conclusions did not support the result contended for by the pursuer. There was no basis in the pleadings for a finding of liability against the third defender. The sheriff was correct not to allow any case against the third defender to proceed to proof. The minute of amendment for the pursuer sought to reintroduce the case against the third defender which the sheriff had refused to admit to probation. The sheriff was correct to refuse to receive the minute of amendment.

Discussion

[66] Insofar as relevant for the purposes of the cross-appeal, section 116 of the Courts Reform (Scotland) Act 2014 is in the following terms:

> **"116 Effect of appeal**
>
> (1) This section applies to —
> (a) an appeal to the Sheriff Appeal Court under section 110 (including such an appeal remitted to the Court of Session under section 112), and
> (b) an appeal to the Court of Session under section 113 or 114.
>
> (2) In the appeal, all prior decisions in the proceedings (whether made at first instance or at any stage of appeal) are open to review.
>
> (3) Any party to the proceedings may insist in the appeal even though the party is not the one who initiated the appeal."

[67] As properly conceded by the third defender, the cross-appeal is competent. Such a concession was inevitable having regard to the terms of sub-section 116(2) of the 2014 Act.

However, simply because an appeal is competent, it does not mean that this court is compelled to countenance it. As explained in *McCue* v *Scottish Daily Record & Sunday Mail Ltd* 1998 SC 811 at 824D, the true question in such cases is not one of competency but of whether the court should exercise the power of review which is available to it.

[68] The third defender's opposition to the appeal ostensibly based on mora, taciturnity and acquiescence is, in effect, an argument that in the circumstances of this particular case, this court should not countenance the cross-appeal. As noted above, ICU Europe were entitled to appeal the sheriff's judgment following the debate without permission. They chose not to do so. ICU Europe then chose to lodge a minute of amendment, presumably designed to address the defects identified by the sheriff. At that time, senior counsel was instructed on behalf of ICU Europe. In the hearing of the appeal, we were advised by the solicitor appearing for ICU Europe that the decision not to appeal was taken in consultation with senior counsel, describing it as a "pragmatic one". That course having been adopted, when the sheriff refused the pursuer's motion to receive the minute of amendment, the obvious course would have been to have sought permission to appeal at that stage. That did not occur.

[69] As observed by Sheriff Principal Caplan (as he then was) in *Newcastle Building Society* v *White* 1987 SLT (Sh Ct) 81 at page 83, if a party fails to appeal a procedural determination in time, such failure may readily be held to be unequivocally referable to acceptance of the procedure in question, because once procedure has flowed it cannot be retrieved. That is precisely the situation here. It seems to me that such a conclusion will be more readily drawn in cases such as the present one where the permission of the lower court is not required.

[70] The manner in which the litigation has been conducted subsequent to the interlocutor that is sought to be brought under review is a relevant factor in determining whether to countenance an appeal (see, for example, *John Muir Trust* v *Scottish Ministers* 2017 SC 207 at para [59]). In the present case, ICU Europe elected to proceed to proof against the first and second defenders. The third defender played no part in the proof. There was no reason for her to do so. As argued on behalf of the third defender, evidence in the case having now been led, the clock cannot be turned back. Had the case against the third defender been allowed to proceed to proof, and the third defender participated in that proof, the proof may have been conducted in a different manner.

[71] Importance requires to be attached to the relationship between the prior interlocutors and the final judgment (see *Prospect Healthcare (Hairmyres) Ltd* v *Kier Build Ltd* 2018 SC 155 at para [23]). There is no such relationship in this case. The prior interlocutors, in essence, dealt with the case directed against the third defender; the final interlocutor does not. The efficacy of an appeal in such circumstances has been doubted, see *John Muir Trust* at para [57].

[72] As noted by the Lord President in *Prospect Healthcare (Hairmyres) Ltd* at para [23], the intention of the equivalent Court of Session rule (Rule of Court 38.6(1)) is to allow the appellate court "to do complete justice". In the present case, to consider the cross-appeal in circumstances where the pursuer chose not to challenge the sheriff's interlocutor of 6 July 2018 for "pragmatic reasons" would be a failure to do complete justice.

Disposal - cross-appeal

[73] For the foregoing reasons, I would refuse the cross-appeal. The pursuer should be found liable to the third defender in the expenses occasioned thereby and the appeal certified as suitable for the employment of junior counsel.

Postscript

[74] The procedure which followed the sheriff's interlocutor of 6 July 2018, that which refused to admit to probation the case directed against the third defender, somewhat curiously, did not dispose of the action as laid against the third defender. I propose that we rectify that position and dismiss the action in so far as laid against the third defender; and that the pursuer be found liable to the third defender in the expenses of the action, except in so far as already dealt with.

SHERIFF APPEAL COURT

GLW-CA30-19

Sheriff Principal D L Murray
Sheriff Principal C D Turnbull
Appeal Sheriff W H Holligan

OPINION OF APPEAL SHERIFF W H HOLLIGAN

in appeal by

MOHAMMED AQEEL ALAM and TAHIR SHAH,

on behalf of ICU (EUROPE) LIMITED

Pursuer and Respondent

against

SAQUIB IBRAHIM

First Defender and Appellant

ICU (SECURE) LIMITED

Second Defender

and

SADIA IBRAHIM

Third Defender and Respondent

Pursuer and Respondent: A W MacKenzie, solicitor; Harper Macleod LLP
First Defender and Appellant: C C Wilson, advocate; Balfour & Manson LLP
Second Defender: No appearance
Third Defender and Respondent: G Dewar, advocate; Thorley Stephenson Ltd

1 December 2020

[75] I have had the benefit of reading in draft the opinions of your Lordship in the chair and Sheriff Principal Turnbull. I agree with their respective conclusions in relation to the appeal and the cross-appeal and the orders they propose.